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Attorney for Defendant Roger Wilson

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AMY J HUNLEY  
CLERK OF SUPERIOR COURT  
BY \_\_\_\_\_  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA,	)	Cause No.: CR 2017-00516
	)	
Plaintiff,	)	MOTION FOR CHANGE
	)	OF VENUE
v.	)	
	)	
ROGER DELANE WILSON,	)	
	)	
Defendant.	)	Assigned to Judge Conlogue
	)	
_____	)	

COMES NOW the Defendant, ROGER D. WILSON, by and through his attorney, STEVEN D. WEST, and hereby moves for an order changing venue of this case pursuant to *Rule 10.3* of the *Arizona Rules of Criminal Procedure* and the following memorandum of points and authorities.

## MEMORANDUM OF POINTS AND AUTHORITIES

### FACTS:

The defendant has been charged in a six count indictment with one count of first degree murder, one count of second degree murder, one count of manslaughter, one count of disorderly conduct, and two counts of weapons misconduct for possessing firearms while being a prohibited possessor. The acts leading up to the charges are alleged to have occurred in the early morning hours of June 22, 2017. The incident resulted in the death of Jose Daniel "JD" Arvizu.

Since the beginning of this case, Mr. Wilson has had numerous attorneys appointed to assist him. It is believed that Mr. West is the seventh attorney to date.

There have been two separate grand juries held in this case; the first one was held shortly after the incident occurred, on June 29, 2017. Mr. Wilson's first attorney, Mr. Wilkinson filed a motion to remand for a redetermination of probable cause, based on his allegations of the state having "cherry-picked" testimony and evidence, and failing to present the existing exculpatory evidence to the grand jury. (See Motion for Remand to the Grand Jury for Redetermination of Probable Cause, October 6, 2017). Mr. Wilkinson apparently attached a copy of the grand jury transcript to his motion, making it available to the public.

David Morgan, a local blogger, was then able to obtain a full copy of the

transcript of the grand jury proceedings, and he published it in its entirety on the internet. Mr. Morgan is well known in Cochise County, and he, in fact, made a name for himself in 2012 by publishing the crime scene photographs from the death of then Cochise County Sheriff, Larry Dever.

In October, 2017, after the Motion to Remand was filed and Mr. Morgan had published the grand jury transcript on the Facebook page that he moderates, he was involved in a lengthy court proceeding (CV-2017-00670) over the legality of his disclosure of transcripts. Mr. Morgan ultimately prevailed in court based on the court finding that he had legally obtained the transcripts, and he was free to publish them under the First Amendment as news items. This court proceeding was extensively reported in the area in the newspaper, as well as on social media.

During the civil court proceedings involving Mr. Morgan and Cochise County, the County Attorney specifically stated its position by admitting that the dissemination of grand jury transcripts to the internet was “causing actual harms, including tainting the potential jury pool related to the Wilson case, which is active and ongoing.” (See Partial transcript of Preliminary Injunction Proceedings, p.207, lines1-3)(Attached as Exhibit “A”).

The motion for a new grand jury hearing was never argued, and a second Grand Jury convened on February 15, 2018. However, the damage had already been

done. Not only had the grand jury been subjected to an improper presentation of both the facts and the law,<sup>1</sup> but the entire community had been made aware of the proceedings from the first grand jury presentation. Mr. Wilson was re-indicted for the murder of J.D. Arvizu, which was again reported in the local news.

Many articles were written about this case and Mr. Wilson, as well as the litigation involving Mr. Morgan and Cochise County. Additionally, there is ongoing social media commentary on “Cochise County Courts, Crime, Jail, Justice & Politics,” a local blog. As recently as November, 2018, the blog was interested in the updates and information on this case. Mr. Morgan has never hesitated to provide public commentary and information to anyone asking, and responds to inquiries in a public forum.

The following are only some of the items that have been published in relation to this case and support the requirement of a change of venue motion pursuant to *Rule 10.3(b)* of the *Arizona Rules of Criminal Procedure*. They are:

1. December 19, 2017 – “Cochise officials pursue blogger for publishing transcript” -

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<sup>1</sup>An improper instruction on the issue of first degree murder relating to premeditation and reflection was read to the grand jury (G.J. 6/29/17, p. 8, lines 1-7) and relied upon in finding probable cause to indict. In addition, the prosecutor acted improperly by being the main witness during the entire grand jury presentation by reading from the defendant’s statement in leading questions to the witness (too numerous to cite here), so that all the witness had to do was say “yes” to the majority of the questions. At the same time, she put her own spin on statements and presented her own conclusions, as well.

*Arizona Daily Star*

2. February 18, 2018 – “2<sup>nd</sup> Grand Jury returns first-degree murder charge” - *Sierra Vista Herald*
3. February 27, 2018 – Facebook post by Michele Arvizu, mother of J.D. Arvizu, made on David Morgan’s account.
4. March 1, 2018 – Posting of video chat and jail visits with Roger Wilson, posted on David Morgan’s Facebook page.
5. March 2, 2018 – Partial Transcript of Preliminary Injunction hearing from S0200CV201700670, published on David Morgan’s Facebook account.
6. April 30, 2018 – “Showdown in Cochise County: Judge Sides with Citizen Journalist in First Amendment Fight” <https://www.FrontPageConfidential.com>, [www.facebook.com/FrontPageConfidential](https://www.facebook.com/FrontPageConfidential), <https://twitter.com/fpctweets>)
7. October 7, 2018 – “Wilson ordered to undergo mental health eval” - *Sierra Vista Herald*
8. November 8, 2018 – “David, what’s going on with the Roger Wilson case??” - Facebook commentary where Mr. Morgan responds to questions regarding this case and includes links to the latest Motion to Withdraw as counsel, the Order of No Contact that was granted as to Mr. Morgan being prohibited from further contact with Mr. Wilson, as well as a list of State’s Notice of Potential Witnesses

for Trial and the Motion for No Contact filed by Mr. Wilson's sixth attorney, Jacob Amaru.

In addition, while the defendant has been involved in the RTC program at the Pima County jail, Dr. Serena Gorgueiro wrote a report that indicated that Mr. Wilson "likely would benefit from a change of venue" because of his focus on his "past with the current court and jurisdiction." (RTC report dated 6/6/19, p. 11).

## LAW

A fair trial is a fundamental liberty secured by the United States and Arizona Constitutions. *State v. Bible*, 175 Ariz. 549, 567, 858 P.2d 1152, 1170 (1993). Included in the right to a fair trial, is the right to have a jury determine the guilt or innocence of an accused solely on the evidence admitted at trial. *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642 (1961). The failure to accord an accused individual a fair hearing by a panel of impartial jurors, violates "even the minimal standards of due process." *Irvin*, 366 U.S. at 722, 81 S.Ct. at 1642.

Pursuant to *Rule 10.3* of the *Arizona Rules of Criminal Procedure*, a defendant may seek a change of venue if the pre-trial publicity has been so pervasive that the defendant will probably be deprived of a fair trial. *State v. Cruz*, 218 Ariz. 149, ¶ 12, 181 P.3d 196, 203 (2008). Courts have adopted a two-step inquiry to determine the effect of pretrial publicity: (1) did the publicity create a presumption

of prejudice, and (2) has the defendant shown actual prejudice. *State v Jones*, 197 Ariz. 290, ¶44, 4 P.3d 345, 362 (2000); *See State v. Murray*, 184 Ariz. 9, 26, 906 P.2d 542, 559 (1995).

The pretrial publicity in this case has been varied and voluminous in nature.

It has included an argumentative commentary between the mother of the alleged victim and others on social media. There has also been public reporting on the number of attorneys that have been appointed to represent Mr. Wilson and then withdrawn; the litigation between the county and the journalist, who has made it his mission to publish all information about this case before it is resolved including the mental competency evaluation of Mr. Wilson; and commentary not only on the newspaper articles but also on social media of people interested in this case. This does not even address the publicity around the fact that Mr. Wilson was in a physical altercation with one of his previous attorneys, nor does it address the fact that the entire grand jury transcript was made public.

There is no way to un-ring the bell on the prospective jurors in Cochise County knowledge about this case.

If "a defendant can show pretrial publicity so outrageous that it promises to turn the trial into a mockery of justice or a mere formality, prejudice will be presumed without examining the publicity's actual influence on the jury." *State v. Bible*, 175

Ariz. 549, 563, 858 P.2d 1152, 1166 (1993). A Court must first ask if the publicity pervaded the court proceedings to such an extent that prejudice can be presumed *State v. Miles*, 186 Ariz. 10, 15, 918 P.2d 1028, 1033 (1996). If not, the defendant must show actual prejudice. *Id.*

Prejudice is presumed when the publicity has been so unfair, so prejudicial, and so pervasive that the court cannot give any credibility to the jurors' answers during voir dire. *Cruz*, 218 Ariz. at ¶ 15, 181 P.3d at 204, quoting *State v. Bolton*, 182 Ariz. 290, 300, 896 P.2d 830, 840 (1995); see *Irvin*, 366 U.S. at 727-728, 81 S.Ct. at 1645 (recognizing that when a defendant's life is at stake, and because of pre-trial publicity, over two-thirds of the jurors were familiar with the material facts and had an opinion that the defendant was guilty, the jurors' statements of impartiality during *voir dire* should be given little weight). The Arizona Supreme Court has recognized that in cases where the media successfully "whip[s] up hysteria and passion in the community," courts have found a presumption of prejudice to exist. *Bible*, 175 Ariz. at 565, 858 P.2d at 1168.

The larger the audience, and the more outrageous the publicity, the more likely it is that a court will presume prejudice. See *Rideau v. Louisiana*, 373 U.S. 723, 726, 83 S.Ct. 1417, 1419 (1963) (holding that it was a denial of the defendant's due process rights to refuse the change of venue after the people of the Parish "had




been exposed repeatedly and in depth to the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged.”)

Not only can prejudice be presumed by the publication of the grand jury transcripts, it can be shown to be actual prejudice as indicated by the county attorney's office. The county attorney's office itself argued that there has been actual harm done in this case, by the publication of the grand jury transcripts by Mr. Morgan. In fact, the argument was made on the record by the county attorney that the jury pool had already been tainted with regards to Mr. Wilson's ability to have a fair and impartial jury seated in this pending and ongoing case.

The media attention that has been given, with regards to protection orders granted, and mental health evaluations needed, and the sheer number of attorneys that have been appointed to Mr. Wilson in the past eighteen months is newsworthy only because it is controversial and unusual as far as criminal cases are generally handled. The widespread and varied dissemination of outrageous information makes it an easy task to presume prejudice. Much more has been published about this case since the point in time when the county attorney stated that actual jury pool taint had occurred, which simply bolsters a finding of actual prejudice already having occurred. It follows that by having made those arguments, that the county attorney has effectively waived any argument to the contrary at this point.

WHEREFORE Mr. Wilson respectfully requests that based on the totality of the circumstances, and in the interests of protecting his due process right to a fair trial, that his change of venue request be granted.

RESPECTFULLY submitted this 6<sup>th</sup> day of June, 2019

  
\_\_\_\_\_  
Steven D. West  
Attorney for Defendant Wilson

Copy of the foregoing  
mailed/delivered this date to:

Lori Zucco  
Deputy County Attorney  
150 Quality Hill Road  
Bisbee, Arizona 85603

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF COCHISE

OFFICE OF THE COCHISE  
COUNTY ATTORNEY,  
Plaintiff,

vs.

David Morgan

Defendant.

No. S0200CV201700670

Bisbee, Arizona  
March 2, 2018  
9:33 a.m.

BEFORE: The Honorable Thomas Fink

**PARTIAL TRANSCRIPT**

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
Preliminary Injunction

REVOLUTIONARYTEXT  
ARIZONA FIRM NO. R1110  
HILARY ZIVE  
CERTIFIED COURT REPORTER  
CERTIFICATE NO. 50729

Exhibit "A"

1 of Arizona, and he is further causing actual harms,  
2 including tainting the potential jury pool related to the  
3 *Wilson* case, which is active and ongoing.

4 And the County alleges that although it may  
5 prosecute Mr. Morgan for his misdemeanor offense or  
6 offenses, but that the prosecution will not and cannot  
7 compel the removal of the protected materials from the  
8 public sphere and that the County has no other adequate  
9 remedy.

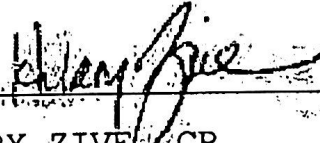
10 The County seeks the following relief:  
11 That Mr. Morgan remove any hyperlink depiction,  
12 photograph or other means of publication of the grand  
13 jury transcripts and all exhibits thereto. This includes  
14 the photograph of the victim that was dated June 29th,  
15 2017, in the case of *State of Arizona vs. Roger Wilson*  
16 and that he remove those materials from any and all  
17 Internet sites over which he and anyone acting under his  
18 control -- that he remove those materials from any and  
19 all Internet sites over which he or anyone who is working  
20 for him has control.

21 The County asks that the hyperlink  
22 depiction of the photograph and other means of  
23 publication concerning the motion for remand, including  
24 its exhibits, that was dated October 6th, 2017, in the  
25 *Wilson* case be removed from any and all Internet sites

CERTIFICATE

I, HILARY ZIVE, CR, a Certified Reporter in the State of Arizona, do hereby certify that the foregoing 227 pages constitute a full, true and accurate transcript of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

SIGNED and dated this 8th day of March, 2018.

A handwritten signature in dark ink, appearing to read "Hilary Zive", is written over a horizontal line.

HILARY ZIVE, CR  
Certified Reporter  
Certificate No. 50729